

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN**

ALEXUS MURPHY, MARKITTA
WITHCER, and DIANE HAINES,
individually and on behalf of all others
similarly situated,

Plaintiff,

v.

ACTIVE INTEREST MEDIA, INC.,
Defendant.

Case No. 22-cv-12159
Hon. David M. Lawson
Mag. Anthony P. Patti

**PLAINTIFF'S MOTION FOR LEAVE TO FILE A
NOTICE OF SUPPLEMENTAL AUTHORITY**

Plaintiff, individually and on behalf of all others similarly situated, files this Motion for Leave to File a Notice of Supplemental Authority in support of Plaintiff's Opposition (ECF No. 26) to Defendant's Motion to Dismiss (ECF No. 24):

1. On March 3, 2023, Magistrate Judge Kimberly G. Altman issued a Report and Recommendation to Deny Defendant's Motion to Dismiss and Motion to Certify Question in *Briscoe v. NTVB Media Inc.*, Case No. 4:22-cv-10352, ECF No. 41 (E.D. Mich. Mar. 3, 2023). Case Attached as 1-A.

2. In *Briscoe*, Magistrate Judge Altman rejected many of the same arguments raised by the Defendant in its pending Motion to Dismiss. Specifically:

a. Magistrate Judge Altman expressly declined to follow *Nashel v. New York Times*, 2022 WL 6775657 (E.D. Mich. Oct. 11, 2022) and *Wheaton v. Apple Inc.*, 2019 WL 5536214 (N.D. Cal. Oct. 25, 2019), and instead held that *Horton v. GameStop Corp.*, 380 F. Supp. 3d 679 (W.D. Mich. 2018) and *Piper v. Talbots, Inc.*, 507 F. Supp. 3d 339 (D. Mass. 2020) were "more persuasive." *Briscoe* at PageID.2693-2698. Accordingly, Magistrate Judge Altman held that the operative complaint in *Briscoe* (which is nearly identical to the operative complaint in this case) stated a claim for relief under the PPPA. *See id.* at PageID.2698.

b. Magistrate Judge Altman held that PPPA claims are governed by the six-year statute of limitations in M.C.L. § 5813. *See id.* at PageID.2708-2714. Magistrate Judge Altman also held that certifying the statute of limitations question

to the Michigan Supreme Court was inappropriate under the circumstances. *Id.* at PageID.2716-2718.

c. Magistrate Judge Altman held that Michigan Executive Order 2020-58 and Michigan Supreme Court Administrative Order 2020-3 operate to toll the statute of limitations in the matter for 101 days. *Id.* at PageID.2715-16 (citing *Carter v. DTN Mgmt. Co.*, -- N.W.2d --, No. 360772, 2023 WL 439760, at *1 (Mich. Ct. App. Jan. 26, 2023)).

3. The proposed Notice of Supplemental Authority is attached hereto as Exhibit 1.

4. On March 3, 2023, counsel for Plaintiff made contact with counsel for Defendant regarding concurrence in this motion. Counsel for Plaintiff could not obtain a position from counsel for Defendant prior to filing this motion.

WHEREFORE, Plaintiff requests that the Court grant Plaintiff's Motion for leave to file the attached Notice of Supplemental Authority.

Dated: March 6, 2023

Respectfully submitted,

/s/ E. Powell Miller
E. Powell Miller (P39487)
THE MILLER LAW FIRM, P.C.
950 W. University Drive, Suite 300
Rochester, MI 48307
Tel: 248-841-2200
epm@millerlawpc.com

Joseph I. Marchese
Philip L. Fraietta (P85228)
BURSOR & FISHER, P.A.

888 Seventh Avenue
New York, New York 10019
Tel: 646.837.7150
Fax: 212.989.9163
jmarchese@bursor.com
pfraietta@bursor.com

Frank S. Hedin
David W. Hall
HEDIN HALL LLP
1395 Brickell Avenue, Suite 1140
Miami, Florida 33131
Tel: 305.357.2107
Fax: 305.200.8801
fhedin@hedinhall.com
dhall@hedinhall.com

Counsel for Plaintiffs and the Putative Class

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN**

ALEXUS MURPHY, MARKITTA
WITHCER, AND DIANE HAINES,
individually and on behalf of all others
similarly situated,

Plaintiff,

v.

ACTIVE INTEREST MEDIA, INC.,

Defendant.

Case No. 22-cv-12159

Hon. David M. Lawson
Mag. Anthony P. Patti

**BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR
LEAVE TO FILE A NOTICE OF SUPPLEMENTAL AUTHORITY**

STATEMENT OF ISSUE PRESENTED

1. Whether Plaintiff should be granted leave to file a Notice of Supplemental Authority in support of Plaintiff's Opposition (ECF No. 26) to Defendant's Motion and Brief to Dismiss (ECF No. 24)

Plaintiff Answers: Yes.

MOST CONTROLLING AUTHORITY

- *Briscoe v. NTVB Media Inc.*, Case No. 4:22-cv-10352, ECF No. 41 (E.D. Mich. Mar. 3, 2023)

For the reasons set forth in the above Motion, Plaintiff, by and through the undersigned attorneys, requests that the Court grant Plaintiff's Motion for Leave to File a Notice of Supplemental Authority in support of Plaintiff's Opposition (ECF No. 26) to Defendant's Motions to Dismiss (ECF No. 24) (proposed notice attached as Exhibit 1 to Plaintiff's Motion).

Dated: March 6, 2023

Respectfully submitted,

/s/ E. Powell Miller
E. Powell Miller (P39487)
THE MILLER LAW FIRM, P.C.
950 W. University Drive, Suite 300
Rochester, MI 48307
Tel: 248-841-2200
epm@millerlawpc.com

Joseph I. Marchese
Philip L. Fraietta (P85228)
BURSOR & FISHER, P.A.
888 Seventh Avenue
New York, New York 10019
Tel: 646.837.7150
Fax: 212.989.9163
jmarchese@bursor.com
pfraietta@bursor.com

Frank S. Hedin
David W. Hall
HEDIN HALL LLP
1395 Brickell Avenue, Suite 1140
Miami, Florida 33131
Tel: 305.357.2107
Fax: 305.200.8801
fhegin@hedinhall.com
dhall@hedinhall.com

Counsel for Plaintiffs and the Putative Class

CERTIFICATE OF SERVICE

I hereby certify that on March 6, 2023, I electronically filed the foregoing documents using the Court's electronic filing system, which will notify all counsel of record authorized to receive such filings.

/s/ E. Powell Miller
E. Powell Miller (P39487)
THE MILLER LAW FIRM, P.C.
950 W. University Dr., Ste. 300
Rochester, MI 48307
Tel: (248) 841-2200
epm@millerlawpc.com